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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 949

JAMES M. SINCLAIR, JR.,
Appellant

vs.

GLENN R. BAKER, ROBERT D. GRAY, JOSEPH WYATT, JR., FORD CHATTERS, and ROBERT ASH, as the State Personnel Board; JOHN F. FISHER, as the Executive Officer of the State Personnel Board; and IRVING H. PERLUSS, as Director of the Department of Employment as Real Party In Interest,
Appellees

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

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APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

The Opinion Below

The opinion of the District Court of Appeal of California was reported in Volume 219 of Advance California Appellate Reports at page 915 and also in Volume 33 of the California Reporter at page 522. A copy of this opinion is printed infra in the Appendix.

JURISDICTION

This is an appeal from a decision of the California District Court of Appeal affirming a judgment of the Superior Court of Los Angeles County. The judgment denied a writ

of mandate, prayed under California Code of Civil Procedure Section 1094.5, to set aside a quasi-judicial decision of the California State Personnel Board. The decision of the Board was that the appellant's work was unsatisfactory, penalties therefor being automatic under law.

The judgment was dated April 6, 1962, and entered April 12, 1962. The Opinion of the appellate court was filed September 6, 1963. A petition for rehearing was denied October 3, 1963. A petition for hearing of the cause before the Supreme Court of California was denied October 23, 1963. All filings were timely and the judgment was final, and the Notice of Appeal was then filed December 4, 1963, in the District Court of Appeal of California, Second Appellate District.

The jurisdiction of this Court on appeal is conferred by 28 U.S.C. Sec. 1257(2).

The California District Court of Appeal upheld the deciding procedure of the Board, declaring valid California Government Code Section 19582(b) against Appellant's assertion that the statute was repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. This court was the highest court of California in which a decision could be had.

Cases believed to sustain the jurisdiction of this Court on appeal include *Winters* v. *People of State of New York*, 333 U. S. 507, 509; *Cities Service Co.* v. *Peerless Co.*, 340 U. S. 179, 181; *Nelson* v. *County of Los Angeles*, 362 U. S. 1, 4; and *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 547 (28 U.S.C. Sec. 2103).

California Government Code Section 19582 (Statutes of California 1953, chapter 1536, page 3209, section 6) reads as follows:

"(a) Hearings may be held by the board, or by any authorized representative, but the board shall render the decision which in its judgment is just and proper.

(b) If a contested case is heard by an authorized representative he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the board as a public record. The board itself may adopt the proposed decision in its entirety, or may reduce the punitive action set forth therein and adopt the balance of the proposed decision.

(c) . . . "

QUESTIONS PRESENTED

I.

Is California Government Code Section 19582(b) invalid as repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution when the California courts interpret it as authorizing the State Personnel Board to make a quasi-judicial punitive decision *without considering either evidence or argument?*

II.

Did California deprive the Appellant of property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, by denying him a fair hearing of the punitive administrative charges?

STATEMENT OF THE CASE

The judicial proceedings were begun by a Petition for Writ of Mandate filed by Appellant in the Superior Court of Los Angeles County. The Petition claimed that the State Personnel Board had a legal duty to give Appellant a fair hearing and decision on the charges of inefficiency before depriving him of his federally financed legal salary.

The Petition raises the primary federal question:

> " . . . The Board did not allow the petitioner to be heard in the matter, nor did the Board have a transcript of the petitioner's testimony or any testimony . . . The actions of the respondents constitute deprivation of the petitioner's property right to his lawful salary by the State of California without that due process of law required by the Fourteenth Amendment to the Constitution of the United States." (R. 9)

The Superior Court found that the Board received no argument or evidence and that the Board was authorized by state law to decide the charges thusly solely on the report of a hearing officer (R. 48-49).

On appeal to the District Court of Appeal the federal question was again raised, in Appellant's Opening Brief Argument V:

> " . . . That Court held in the administrative law landmark case of *Morgan v. United States* (1935), 298 U. S. 468, 481-482, that, in order not to violate due process of law, the decision had to be made by him who had addressed himself to consideration of the evidence . . . " (R. 107).

The District Court of Appeal held California Government Code Section 19582(b) to be valid against the federal question:

"III.

It is undisputed that, after the trial before the hearing officer of the State Personnel Board, the hearing officer prepared findings of fact and a proposed decision. These were presented to the State Personnel Board and adopted in their entirety by vote of the board. The board in adopting this proposed decision neither considered the evidence nor argument of the parties entered at the hearing. Petitioner argues that, by reason of the procedure, he was deprived of due process of law. For this position he strongly relies on the so-called Morgan line of cases. However, these cases are not controlling here. After much careful thought and deliberation, the procedure followed in this case was expressly upheld in *Hohreiter* v. *Garrison* (1947) 81 Cal. App. 2d 384, 393.

The express statutory authority for the procedure followed by the State Personnel Board is Government Code, section 19582 subdivision (b). While *Hohreiter* v. *Garrison* (1947) *supra*, 81 Cal. App. 2d 384, concerned itself in part with section 11517 subdivision (b) of the Government Code, that decision is controlling here. In view of the almost identical wording of both sections, no good reason exists for adopting a different construction of one statute than the other, especially since they both deal with the same subject matter—the duties of a hearing officer and an administrative agency in the California state service. (*Fichera* v. *State Personnel Board* (1963) 217 A.C.A. 674, 679-681)" (R. 290)

Appellant unsuccessfully petitioned the California Supreme Court for a hearing:

"Section III of the Opinion of the District Court of Appeal therefore held Government Code Section 19582(b) to be valid as against the question raised

by the Appellant that it was repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution." (R. 259-260)

The second federal question, denial of fair trial, was raised by a petition for rehearing (R. 57) denied by the Board without comment. It was repeated in the petition for writ of mandate (R. 12-17); the Superior Court decided that the trial had been fair (R. 49). Again, the question was in the briefs before the District Court of Appeal (R. 106) where Opinion section V curtly stated the trial had been fair (R. 293). Finally, the question was presented in the denied Petition for Hearing before the California Supreme Court (R. 260).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The grave importance of Appellant's primary federal question results from the lack of respect accorded below to one of the most fundamental judicial principles.

The principle is more basic than trial by jury, the right to counsel, or the right to testify and cross-examine. This Court has said that the principle is the very basis of *trial*, a "hearing" (at page 480-1 of 298 U. S.).

The classic opinion of this Court in *Morgan* v. *United States*, 298 U. S. 468, has so much excellent expression that reprinting it all here would make this Jurisdictional Statement overlong. After reading the full opinion, let us go further, on the base of the abbreviated expression that "the one who decides *must* hear".

There is just no due process of *law* if this is not complied with. It would not be law in our tradition, but "expediency", "administration", "government of men", or "political legislation" in the *worst* sense of those terms. Ideals and social organization would degenerate into naked power struggle, "self-help", anarchy, tyranny (see, Roscoe Pound, in foreword to *Haynes, Selection of Judges* at xii).

The court below expressly refused (supra) to honor the opinion of this Court in *Morgan*, apparently feeling required to decide against the Appellant and in favor of the near-at-hand state executive, considering the ambiguous legislative mandate in Government Code Section 19582(b). Degree of respect may be a function of degree of proximity, so Appellant has appealed to bring the two courts into immediate proximity to produce conformity in constitutional interpretation.

The present case is identical with the *Morgan* case. In both cases the power of decision was legally restricted to a certain position (Secretary of Agriculture; State Personnel Board), while another heard the evidence and argument (Assistant Secretary; Hearing Officer) and submitted only a prepared decision to the superior for adoption.

This Court struck down any such decision by the secretary—can it do otherwise with the Board's purported decision?

After the *Morgan* decision, this Court extended its consideration of the rules of administrative hearing procedural due process in *Morgan* v. *United States*, 304 U. S. 1, and in *Anniston* v. *Davis*, 301 U. S. 337, 356-7.

It need not be extensively gone into, but it is obvious

that this case is not an unimportant and isolated instance, but the usual rule of California, with 80 cases a year before this one Board alone flagrantly violating the *Morgan* rule (*Fichera* v. *State Personnel Board*, 217 A.C.A. 674, 32 Cal. Rptr. 159).

The courts of New York, Wisconsin, and Michigan run counter to California and respect the *Morgan* rule, as do the federal courts (*Joyce* v. *Bruckman*, 15 N.Y.S. 679, *Crean* v. *Bruckman*, 33 N.Y.S. 570; *State* v. *Wrabetz*, 285 N.W. 504; *Dation* v. *Ford Motor Co.*, 22 N.W.2d 252; 18 A.L.R. 2d 620-621).

Appellant contends that the failure of the Board to consider the evidence resulted in the adoption of findings af fact not supported by the record, a denial of due process (*I.C.C.* v. *Louisville & Nashville*, 227 U. S. 88, 91).

The secondary federal question is reviewable on appeal-associated-certiorari: *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 547 (28 U.S.C. Sec. 2103).

Upon the hearing, the State of California denied Appellant a fair trial by successfully obstructing his production of the only evidence which *in the nature of the cause* could prove his case. This begs the very question of a hearing and is therefore a denial of due process of law and presents a substantial federal question (*I.C.C.* v. *Louisville & Nashville*, 227 U. S. 88, 93; *Oregon* v. *Fairchild*, 224 U. S. 510, 525; *Morgan* v. *U. S.*, 298 U. S. 468 *and* 304 U. S. 1).

This proposition breaks down into two parts: obstruction and nature of the cause.

The first obstruction was the failure of the charges to state factual issues to inform Appellant what he had to rebut. The most that could be found in the vague charges' gobbledegook is that (1) Appellant did as much work as seasoned new workers, and (2) he was expected to do more (although it was never factually explained why). Once the hearing began, however, Appellees produced precise statistics which Appellant was not prepared to rebut. These could readily have been stated in the charges in a single paragraph. The charges also cleverly omitted mention of the issues which Appellees first raised at the hearing and upon only which they made findings of fact to support the decision. *Meyer* v. *Goldwater*, 286 N. Y. 461.

It is a clear denial of due process to charge one offense and convict of a different one, even though they occurred at the same place or in the same setting if the defendant was thereby misled in preparing his defense. And, a charge which is not even possible of factual statement certainly is not possible of proof. A scrambling around to prove something on Appellant, just anything, implies that the conviction of the uncharged offense resulted only by chance or by denial of a fair chance to defend against it. *Kutcher* v. *Higley*, 235 F. 2d 505.

The second obstruction was a threat against Appellant if he were to interview witnesses for the prospective hearing, demonstrating the menacing situation he faced. The Board was informed of this by the Appellant before he received their notice of the hearing, but it failed to respond.

The third and continuous obstruction was in connection with Appellant's attempt to prove his belief that his work

was actually above "Standard". Before the hearing Appellees refused to publish impartial standards as to quantity, quality, etc., of work, as *required by their own regulations* and *refused to allow Appellant to examine his own past work and that of the other workers to show the comparison and "Standard"*.

Failure of an appellee to live up to its own hearing regulations deprives an appellant of due process: *Bridges* v. *Wixon*, 326 U. S. 135, 153, *Accardi* v. *Shaughnessy*, 347 U. S. 260, 268.

The legislature has since expressly recognized this pre-existing right to examine records and has made provision for it to be exercised of right without formality of subpoena (California Government Code Sec. 19574.1).

After Appellees finished their presentation at the hearing, Appellant began by requesting the hearing officer to grant him a subpoena duces tecum to compel presentation of one item of documentary evidence previously known to him which fell into the extensive classification forbidden him by his supervisors. The hearing officer denied this request in haste to end the hearing once Appellees had submitted their case, as well as denying a request for discovery of evidence. This obstruction or suppression of vital evidence by a state amounts to a denial of hearing, as in effect the hearing officer refused to hear Appellant on real evidence as contrasted with incompetent, hearsay, opinion. It also was a denial of effective cross-examination of Appellees' opinions, which would have been done by testing their opinions against real, documentary, evidence.

> "Findings cannot be said to have been fairly reached unless material evidence which might im-

peach, as well as that which will support, its findings, is heard and weighed."

N.L.R.B. v. *Indiana etc.*, 318 U.S. 9, 28

The fourth obstruction was refusal of Appellees to allow preparation of a transcript of the hearing at Appellant's cost in time for the already scheduled continuation of the hearing in four weeks. This transcript was essential to "tie down" the shifty issues and statements of Appellees so that Appellant could more clearly understand the charges and then "overwhelmingly" present his case to "barely" convince the biased hearing officer, and also make such a strong case for issuance of the forbidden subpoenas, "chapter and verse", that a court would reverse any denial of subpoenas needed to cross-examine the supervisors' statistics and testimony, even if general discovery was precluded.

Associated with this obstruction was the hearing officer's denial of a sufficient continuance of the hearing to secure such a transcript, or, at the least, after the surprising notice of final refusal of transcript, sufficient time to resort fully to secondary sources to prepare the Appellant to begin to present his case. Appellant at no time had sufficient time to prepare his case even though he often informed the hearing officer of his unpreparedness—a clear denial of due process. The missing witness Carmelita Herbage thus never testified.

> "It is vain to give the accused a day in court, with no opportunity to prepare for it . . . "

Powell v. *Alabama*, 287 U. S. 45, 59.

> " . . . he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of . . . "

Reynolds v. *Cochran*, 365 U. S. 525, 530, referring to one of the major incidents of fair hearing.

The fifth obstruction was the duress and menace exerted by Appellees to prevent Appellant from energetically presenting his case. It may be noted that the charges were only a screen for revenge against Appellant for his testimony against Appellees at another hearing. They are attacking his freedom of speech, conscience, and thought obliquely, since a direct attack would be ridiculous. Energetic assertion of his rights in this unequal battle with his employers would result in other punishment, rendering ineffectual any favorable decision at this hearing, *as Appellees' counsel angrily let slip out at the hearing* (R. 755). Appellant thus could not secure adequate leave of absence to prepare his case and could proceed only in his spare time and only in such discreet manners as expressly approved by his opponent-superiors in advance.

The Appellees did not sum up their case and/or give Appellant a chance to argue his case and against theirs. It may be seen that this lack of summing up led to the hearing officer making findings on facts never stated as issues by the charges, as well as findings not supported by the evidence. This error in the second *Morgan* case, 304 U. S. 1, 18-20, caused reversal of the judgment and should do the same here.

The nature of the cause was to decide whether the derogatory opinion of Appellant charged by his superiors was in fact true.

The evidence upon which the decision should be made was peculiarly within the control of these superiors as only they had a comprehensive view of all the fellow workers of Ap-

pellant, only they had control of the vital files of the work performed. The legal provision for a hearing on the charges itself demonstrates that the opinion of the charger is insufficient evidence to sustain his burden of proof that Appellant was "Short of Standard"; if opinion alone were sufficient, the charges alone would result in convicting the employees.

However, the hearing officer's decision indicates that *Appellant* did not sustain the burden of proof, a burden to prove himself innocent. Appellant contends the officer thus erred, the law placing the burden of proof on the Appellees.

Due process would require that Appellant be granted increased *access* to evidence to persuade the tribunal if he were to meet this burden of proof imposed wrongly by the hearing officer.

In substance, the decision was based on the hearing officer's acceptance of the supervisors' *opinions* over those of the Appellant on each issue of the decision, as a result of Appellees' systematic suppression of real and documentary *evidence* preventing Appellant from putting it into the record (supra).

A hearing so based on opinion is, considering due process of law, no hearing at all!

> "Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment."

Moore v. *Rose*, 289 U. S. 373, 384.

> "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital."

Pittsburgh v. *Backus*, 154 U. S. 421, 426.

This obvious bias is confirmed by the fact that these hearings habitually are decided against the employees. The apparent conclusion to draw is that Appellees intend to give only the *form* of a hearing, not the *substance*, and thus have no intention ever to decide for the employee or to waste any more time than necessary to "make it look good" and have no intention to descend to embarrassing facts from a lazy, arbitrary, and irreversible decision between contradictory "name-calling opinions", opinions no more necessarily connected with the truth than verdicts by wager of law or trial by ordeal or battle. Thus due process of law is not satisfied.

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

Ohio Bell v. *P.U.C.*, 301 U. S. 292, 305.

Also, *In Re Murchison*, 349 U. S. 133, 136, particularly:

> " . . . justice must satisfy the appearance of justice."

Appellant in Pro Se

APPENDIX

(Title of Court and Cause)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Kenneth N. Chantry, and Philbrick McCoy, Judges. Appeal from order denying new trial dismissed; orders taxing costs modified and affirmed; order denying motion to vacate judgment affirmed; judgment affirmed.

Appeal from a judgment and supplementary orders in a proceeding in mandate to reverse a decision of state personnel board. Appeal from one order dismissed; other orders affirmed or modified and affirmed; judgment for respondents affirmed.

James M. Sinclair, Jr., in propria persona, for Appellant.

Stanley Mosk, Attorney General, and Lynn Henry Johnson, Deputy Attorney General, for Respondents.

Petitioner has been continuously employed by the State of California since 1954. From June, 1955, to September, 1960, petitioner was assigned to a permanent position in the State Civil Service as a Special Investigator for the Department of Employment. Some time in March, 1960, petitioner's supervisors prepared an annual report of his performance in his position as a Special Investigator. This report stated that petitioner's over-all performance for the preceding twelve months was "short of standard."

Petitioner appealed this report to the director of the

Department of Employment. The petitioner was then upgraded, but his over-all rating was still "short of standard." The effect of this rating was to deny petitioner an annual salary increase, prevent his promotion in the agency, impair his prospective retirement monthly allowance, and render his position liable to layoff, demotion and dismissal.

On May 3, 1960, petitioner appealed his performance report rating to the State Personnel Board. A hearing was held in the matter before a hearing officer of the State Personnel Board at Los Angeles on May 24, June 20, and June 22, 1960. Petitioner appeared at the hearing without counsel. However, he introduced both oral and documentary evidence, exhaustively cross-examined all witnesses that appeared against him, and argued points of law to the hearing officer. On July 8, 1960, the hearing officer tendered to the State Personnel Board a "Proposed Decision" in which he recommended that petitioner's appeal to the board be denied. That same day the board, without any transcript of the hearing before it, adopted as its decision the Proposed Decision of the hearing officer. On August 10, 1960, petitioner requested the board for a rehearing, and on September 23, 1960, the board denied the petition.

Finally, in due course, petitioner filed a petition for a writ of mandate in the superior court, requesting reversal of the decision of the State Personnel Board, a mandate to establish fair working standards, and a pay raise. The petition for the writ was denied.

Petitioner now appeals from the denials of: his petition for a writ of mandate; his motion for new trial; his motion to vacate judgment; his motion to retax respondents' cost bill; and his motion to vacate the order denying retaxation of the cost bill.

An order denying a new trial is not appealable. (*Hamas-*

aki v. *Flotho* (1952) 39 Cal. 2d 602, 608). Therefore, this appeal must be dismissed. Ordinarily an order denying a motion to vacate an order denying retaxation of costs would not be appealable, since an appeal lies from the original order. (3 Witkin, California Procedure, pp. 2170-2171). However, here, petitioner's motion also sought relief under section 473 of the Code of Civil Procedure. An order denying such relief is appealable (3 Witkin, supra, p. 2171).

While an appeal will not lie from an order denying a motion to vacate a prior appealable judgment (*Litvinuk* v. *Litvinuk* (1945) 27 Cal. 2d 38, 44), a judicial exception has been recognized where such motion is made pursuant to section 663 of the Code of Civil procedure. (*Socol* v. *King* (1949) 34 Cal. 2d 292, 296, and cases cited therein.) This appeal is properly before this court.

On this appeal, petitioner urges: (a) that the decision of the State Personnel Board is not supported by substantial evidence; (b) that the hearing officer denied him a fair and impartial trial; (c) that the procedure of the board in adopting the proposed decision of the hearing officer without any of the facts before it is unconstitutional under the due process clause; and (d) that the superior court erred in taxing costs to him.

II

A preliminary question, first to be disposed of, is whether the petition for writ of mandate was timely filed with the superior court. We believe it was.

A brief examination of the pertinent sections of the Government Code is essential for a proper understanding of this point. Section 19586 gives an aggrieved party thirty days after receipt of a copy of the decision rendered by the board, in a proceeding under article 3 of division 5 of title 2,

within which to apply for a rehearing. At the same time, section 19588 also gives the aggrieved party the right to petition for a writ of mandate without first applying for a rehearing with the board. Section 19630 gives a party claiming to have a cause of action or legal remedy for wrongs or grievances based on or related to any civil service law of this state, the right to commence an action within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. Finally, section 19631 provides that the time for filing or commencing any such action does not run during the time that the matter involved is before the board pursuant to a petition of the person involved, and final action has not been taken by the board.

In examining the chronological time sequence leading up to the filing of the petition for writ of mandate, we find that, on July 11, 1960, notice of the board's decision was mailed to petitioner. On August 10, 1960, petitioner timely filed his petition for reconsideration with the board. On September 26, 1960, notice of the board's denial of the petition for reconsideration was mailed to petitioner. And on September 21, 1961, petitioner filed with the superior court his petition for writ of mandate.

Respondents take the position that the time allowable for plaintiff to have filed his petition for writ of mandate pursuant to section 19630, should be measured from July 11, 1960, to September 21, 1961, minus that time which the board had the petition for reconsideration pending before it. Respondents chose July 11 as the starting point for computing the time, because section 19588 gives petitioner the right to petition the superior court for writ of mandate without first petitioning the board for a reconsideration of the matter. Therefore, respondents contend, it was at

that date that petitioner had cause to complain, and the running of the statute of limitations is to be measured from that date. Naturally, under this construction the petition for writ of mandate would not have been timely filed with the superior court.

However, we do not acquiesce in this construction. Not only does it run counter to the general policy that a litigant preferably should allow a trial body to correct its own errors, but it ignores the effect of section 70 of title 2 of the California Administrative Code. We believe that the accurate construction of these sections is as follows: Section 19588 serves a single purpose—to give to the aggrieved party the option, but not the obligation, to file his petition for a writ of mandate without first exhausting his administrative remedies; but it does not affect the application of section 19630. Under 2 California Administrative Code, section 70, the decision of the board did not become final until thirty days after service of a copy thereof on the party. If no petition for reconsideration had then been filed, the one-year statute of limitations began to run at that time. But the matter was pending before the board during that thirty day period and where, as here, a petition for reconsideration was timely filed, the pendency continued without interruption until service of the notice of denial. In this case, the statute did not begin to run (allowing the additional day provided for by section 1013 of the Code of Civil Procedure) until September 27, 1960. The petition filed on September 21, 1961, was well within the time.

III

It is undisputed that, after the trial before the hearing officer of the State Personnel Board, the hearing officer

prepared findings of fact and a proposed decision. These were presented to the State Personnel Board and adopted in their entirety by vote of the board. The board in adopting this proposed decision neither considered the evidence nor argument of the parties entered at the hearing. Petitioner argues that, by reason of this procedure, he was deprived of due process of law. For this position he strongly relies on the so-called Morgan line of cases.[1] However, these cases are not controlling here. After much careful thought and deliberation, the procedure followed in this case was expressly upheld in *Hohreiter* v. *Garrison* (1947) 81 Cal. App. 2d 384, 393.

The express statutory authority for the procedure followed by the State Personnel Board is Government Code, section 19582 subdivision (b).[2] While *Hohreiter* v. *Garrison* (1947) *supra*, 81 Cal. App. 2d 384, concerned itself in part with section 11517 subdivision (b)[3] of the Government Code, that decision is controlling here. In view of the almost identical wording of both sections, no good reason exists for adopting a different construction of one statute than the other, especially since they both deal with the same subject matter—the duties of a hearing officer and an administrative agency in the California state service.

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[1] 298 U. S. 468 and 304 U. S. 1.

[2] "If a contested case is heard by an authorized representative he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the board as a public record. The board itself may adopt the proposed decision in its entirety, or may reduce the punitive action set forth therein and adopt the balance of the proposed decision."

[3] "If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

(*Fichera* v. *State Personnel Board* (1963) 217 Cal. App. 2d ——.)[4]

IV

Petitioner further argues that the decision of the State Personnel Board, and of the superior court, are not supported by substantial evidence in light of the whole record.

It is settled law in this state that factual determinations of a statewide administrative agency which derives adjudicating power from the Constitution are not subject to reexamination in a trial *de novo* but are to be upheld by a reviewing court if they are supported by substantial evidence. (*Shepherd* v. *State Personnel Board* (1957) 48 Cal. 2d 41.)[5]

It would serve no purpose to set out the details of petitioner's unsatisfactory service. Petitioner's argument amounts to no more than a contention that his version should have been accepted and that his conception of the manner in which his duties were to be performed should have prevailed over the expressed desires of his superiors. The record clearly shows that the decision of the hearing officer and of the board were supported by ample, substantial and overwhelming evidence.

V

Nor do we find any merit in petitioner's claim that he was denied a fair and impartial trial before the hearing officer. On the contrary the record shows just the opposite.

---

[4] 217 A.C.A. 674, 679-681.

[5] At page 47 of this decision the court sets out both the constitutional authority creating the State Personnel Board, and its adjudicating powers.

VI

Petitioner strenuously argues that respondents' cost of preparing a copy of the administrative record was not legally taxable as a cost to him.

At the trial for the petition of writ of mandate, petitioner failed to appear and respondents offered in evidence, for the court's consideration, their copy of the administrative transcript. In their cost bill, filed against petitioner, respondents set forth $96.20 as the cost of this administrative transcript furnished to the court.

The expense of preparing the record of an administrative hearing may properly be taxed as costs against the losing party where such record is offered in evidence by the prevailing party. (*Cooper* v. *State Board of Public Health* (1951) 102 Cal. App. 2d 926, 933.) Such is the case here. Petitioner has no grounds for complaint.

By a subsequent motion to vacate the order taxing costs, petitioner, invoking the provisions of section 473 of the Code of Civil Procedure, alleged that he had not earlier been aware that the amount of the filing fee and of the administrative transcript had been, as he claimed, overstated in the original cost bill. The motion was denied by the court. We think that petitioner's showing entitled him to relief under section 473 if his claim otherwise had merit. As to the cost of the transcript, the evidence was conflicting and the order of denial must stand. As to the filing fee, it seems clear that, considering the applicable statutes,[6] the filing fee should have been taxed at $7.50 and not at $12.50. Insofar as the order denied petitioner this much relief, it is modified so as to allow the claim.

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[6] Gov. Code, sections 70059, 6103 and 6103.5; Bus. & Prof. Code, sections 6322 and 6322.1.

The appeal from the order denying the motion for a new trial is dismissed; the orders denying the motion to vacate the order retaxing costs and the order retaxing costs are modified so as to reduce the item of $12.50 for clerk's fees to $7.50, otherwise those orders are affirmed; the judgment, and the order denying the motion to vacate judgment, are affirmed. Respondents shall recover their costs on appeal.

Kingsley, J.

We concur:

Burke, P. J.
Jefferson, J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 949

JAMES M. SINCLAIR, JR.,
Appellant

vs.

GLENN R. BAKER, ROBERT D. GRAY, JOSEPH WYATT, JR., FORD CHATTERS, and ROBERT ASH, as the State Personnel Board; JOHN F. FISHER, as the Executive Officer of the State Personnel Board; and IRVING H. PERLUSS, as Director of the Department of Employment as Real Party In Interest,
Appellees

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITION FOR REHEARING

JAMES M. SINCLAIR, JR.
Appellant in Pro Se
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THE INLAND PRESS, DETROIT, MICHIGAN

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APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT

PRAYER

James M. Sinclair, Jr., the appellent, prays that this Court: grant rehearing of its order of May 18, 1964, dismissing the appeal for want of jurisdiction; order jurisdiction noted; and order summary reversal of the judgment below, and in support of the petition respectfully shows:

THIS COURT HAS JURISDICTION UNDER 28 U. S. C. 1257 (2)

Supreme Court Practice by Stern and Gressman (3rd Ed., p. 197) indicates that by the Court's use of the phrase

"want of jurisdiction" instead of some other phrase may be meant that the Court believes that no state statute was properly drawn into constitutional question, or that the state court decision did not necessarily hold the statute to be valid as against the constitutional question.

The Statute Was Drawn Into Question As Repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

California Government Code Section 19582 (b):

> "(b) If a contested case is heard by an authorized representative he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the board as a public record. The board itself may adopt the proposed decision in its entirety, or may reduce the punitive action set forth therein and adopt the balance of the proposed decision."

As recited in the opinion of the California District Court of Appeal (R. 290, also printed in the Statement as to Jurisdiction at page 5 and fully at page 15), the Appellant appealed an administrative penalty to the California State Personnel Board, where a hearing officer heard evidence and argument and presented only a proposed decision to the Board, which adopted said decision as its own, precluding a retrial of the facts in any other tribunal, without any other knowledge of the evidence or argument. Logically speaking, *either* the decision of the Board thus violated due process under *Morgan* v. *United States*, 298 U.S. 468, 481-2, *or* the actual decision was made by the hearing officer and was consistent with due process: "only the one who hears may decide" . . . but in violation of the California statutes

and constitution that only the Board had power to make a final decision!

In Appellant's judicial review of the administrative decision he presented his opponents with this dilemma, no way out, either way they turned the decision had to be reversed.

The opinion of the highest state court decided this dilemma by holding that the decision had been made by the Board *and* then dealt expressly with the general question of due process presented thereto by Appellant. It *expressly* held that the Board's practice was *expressly* authorized by the statute:

> "The express statutory authority for the procedure followed by the State Personnel Board is Government Code Section 19582 subdivision (b)." (R. 29C, J.S. 5, J.S. 20.)

and held that Appellant's contention, under *Morgan*, that due process was violated, was rejected solely in the light of a local decision concerning a similar statute (*Hohreiter v. Garrison* (1947) 81 Cal. App. 2d 384, 393). In other words, the *statute* expressly validated the constitutionally questioned procedure, so the court held the statute to be valid as against the contention that it was void as equally repugnant to the due process clause of the United States Constitution as taught by *Morgan*.

The Statute Was Properly Drawn Into Question.

The Appellant had raised the proper federal question of procedural due process, but had not expressly drawn the statute into question as repugnant to the Fourteenth Amendment. At the time it would have been *ridiculous* to do so, as the language of the statute gives no indication

that it authorizes the Board *to deny Morgan constitutional due process* (*Missouri* v. *Gehner*, 281 U.S. 313, 320). It rather seemed that the Board had erred on its own account without aid of the statute.

In determining constitutionality, legislation is always to be upheld if it can in any manner be construed so as to be consistent with the Constitution (Note Section IV of *Baggett* v. *Bullitt*, No. 220, October Term, 1963).

The court incorporated the *Fichera* decision in the judgment by its citation (R. 290; J.S. 5, 21), and did so on its own research as neither party cited the court to it and it had been decided in another district only a few weeks before this case was heard. *Fichera* said, re the challenged statute:

> "Section 19582 of the Government Code provides, in subdivision (a), that 'Hearing may be held by the board, or by any authorized representative, but the board shall render the decision which in its judgment is just and proper,' and as part of subdivision (b), 'The board itself may adopt the proposed decision in its entirety, or may reduce the punitive action set forth therein and adopt the balance of the proposed decision.'
>
> "The duties imposed upon the board, as delineated in this statute, were somewhat lessened from those earlier existent, before amendment of Section 19582 in 1953, for the statute previously had read, 'The board shall consider carefully the evidence submitted in the hearing and render a decision which in its judgment is just and proper.' (Stats. 1951, ch. 862, p. 2374.) Also, in 1953 former section 19585 was repealed. It had provided that 'Hearings may be held by the board, or any authorized representative or referee but the decision shall be rendered by the board after careful consideration of the evidence

> submitted in the hearing' (Stats. 1949, ch. 1416, p. 2471.) Thus, the requirement that the board review the evidence was eliminated." (*Fichera* v. *State Personnel Board*, 217 A.C.A. 674, 32 Cal. Rptr. 159, 162).

Clearly the court below implied to the statute, although unwritten, provision that the Board had full state-given power to decide on no evidence at all, an interpretation clearly repugnant to the Due Process Clause.

In situations of federal constitutional questions, the statute does not mean to this Court what it plainly says, but what the highest state court interprets it as saying (*Kingsley* v. *Regents*, 360 U.S. 684, 688, and cases cited there).

The California Supreme Court declined to review the judgment, leaving it as the final judgment of the highest state court in which a decision could be had, when petitioned by Appellant:

> "One of the important questions of law proposed to be settled by this Court is whether Government Code Section 19582 (b) is constitutional (R. 255). . . . Section III of the Opinion of the District Court of Appeal therefore held Government Code Section 19582 (b) to be valid as against the question raised by the Appellant that it was repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. (R. 259-60)"

In effect, California cannot say that it was not timely apprised of the contention of the constitutional repugnancy of the statute, that it would in such event have otherwise judged the matter.

Thus the Appellant raised the federal question but the District Court of Appeal itself then drew into said question

the "new" statute to uphold the Board, necessarily holding it valid in the process. *Missouri* v. *Gehner*, 281 U.S. 313, 320, is authority for Appellant's contention that he timely assailed the statute, without mention of the many other cases on appellate surprise.

Form, ritual, and "magic words" (*Stern*, p. 65) should not prevail over substantial compliance with 28 U.S.C. 1257(2).

And, when the highest state court considers and decides on a federal question, this Court's concern with the raising of the issue disappears: *Charleston* v. *Alderson*, 324 U.S. 182, 185-186, and cases cited there.

Closing Observations.

As an aside, the *Hohreiter* case properly held this administrative rubber stamping procedure constitutional, as an aggrieved party secured his due process hearing in a trial *de novo* if he sought judicial review, but the court below erred in obstinately applying *Hohreiter* to the State Personnel Board proceedings over Appellant's showing that no *de novo* trial is permitted thereof (even as recited in Section IV of the court's own opinion).

Appellant must confess surprise that this Court found a want of jurisdiction. In fact he felt the case to be so strong, with even no opposition from Appellees, that he might see a summary reversal as in the case of *Hamilton* v. *Alabama*, No. 793, October Term, 1963 ("Who were you arrested by, *Mary?*), something like:

> "Since the statute as interpreted by the court below clearly is void as repugnant to the due process clause (*Morgan* v. *U.S.*, 298 U.S. 468, 481-2), the judgment must be reversed for proceedings not inconsistent with this opinion. *So ordered*"

It is about time for the *Morgan* case to be either reiterated or overruled, to resolve the conflict with the law in California, if not to aid in preserving freedom of speech and conscience (the issue hidden under the bringing of the charges against Appellant).

This appeal presents the other side of the coin of *Escobedo* v. *Illinois*, No. 615, October Term, 1963: "The inclination develops . . . to be satisfied with an incomplete investigation of the other sources." To put it dramatically, in this case appellant law enforcement detective was charged by his superiors with the "heresy" of making complete investigations and unconstitutionally denied a fair hearing of his defense. This Court might better seek to preserve the rights of accused individuals by encouraging officers to properly investigate *by protecting these officers against pressures (towards shortcuts) applied unconstitutionally by superior officers to the investigating officers.*

Certificate.

I, Appellant in Pro Se, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Respectfully submitted,

James M. Sinclair, Jr.

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